

IOWA BOARD OF NURSING

In RE: Petition for)	Declaratory Order No. 105
Declaratory Order Filed By:)	
J. R. "Lynn" Boes on behalf)	RN Supervision of
of the Iowa Association for)	Consumer-directed Attendant
Home Care on January 21, 2003)	Care
)	
)	

A petition for a "declaratory order was filed with the Iowa Board of Nursing by J. R. "Lynn" Boes, on behalf of the Iowa Association for Home Care on January 21, 2003.

Iowa Code Chapter 17A sets out certain notice requirements, which the agency must satisfy upon the receipt of a petition and provides authority for intervention by interested persons. Iowa Code §17A.9(5)(b) also provides that, within thirty (30) days after receipt of a petition for declaratory order, the agency may "set the matter for specified proceedings." In this case, the Board issued a scheduling order setting the matter for consideration on March 6, 2003, and setting out a procedural framework for review of the petition.

As required by the board's rules, the board gave notice to all persons not served by the Petitioner. The board identified an additional eighteen persons and mailed the scheduling order to those individuals. The board received written comments from

three entities and heard oral comments from two persons during the public hearing on March 6, 2003.

Declaratory Orders

Iowa Code §17A.9 provides the Board with statutory authority to issue declaratory orders. That section provides that "any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency." An agency shall issue a declaratory order in response to a petition for that order unless the agency determines that issuance of the order under the circumstances would be contrary to a rule adopted in accordance with subsection 2. Id. Iowa Code § 17A.9(2) provides that the agency "shall adopt rules that provide for the form, contents and filing of petitions for declaratory orders, the procedural rights of persons in relation to the petitions, and the disposition of the petitions." The Board's rules, which reference the Uniform Rules on Agency Procedure, may be found at 655 IAC Chapter 9.

The purpose of the declaratory order provision of the statute is to establish a procedure, which "permits persons to seek formal opinions on the effect of future transactions and arrange their affairs accordingly." Women Aware v. Reagan, 331 N.W.2d 88, 92 (Iowa 1983) citing A. Bonfield, The Administrative

Procedures Act: Background, Construction, Applicability, Public Access To Agency Law, The Rulemaking Process, 60 Iowa L.Rev. 731, 807 (1975). Iowa Code §17A.9 "contemplates rulings based on purely hypothetical facts, and renders them subject to review." Women Aware v. Reagan, 331 N.W.2d at 88; City of Des Moines v. Public Employment Relations Board, 275 N.W.2d 753, 758 (Iowa 1979).

An order issued upon the filing of a petition for a declaratory order "has the same status and binding effect as any final order issued in a contested case proceeding." Office of the Consumer Advocate v. Iowa State Commerce Commission, 395 N.W.2d 1, 6 (Iowa 1986); Iowa Code §17A.9(7). If a declaratory order is issued the order "must contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusion." Iowa Code §17A.9 (7). The agency action taken on the petition is subject to judicial review pursuant to Iowa Code §17A.19. Public Employment Relations Board v. Stohr, 279 N.W.2d 286, 289 (Iowa 1979).

Background information

The growing availability of home and community-based care (HCBC) under the Medicaid program is transforming the nature of formal long-term care services in the United States. HCBC

services permit many persons with disabilities to receive care in their homes or other residential settings rather than in nursing homes. In the past, a lack of alternatives forced persons with disabilities to choose between relying on their family and friends or institutional placement. Now, many individuals: (1) receive formal services at home that support them or their informal caregivers or (2) move to supportive housing, such as adult foster homes or assisted living facilities.¹

In July 1996, the Secretary of the Department of Health and Human Services issued a statement supporting the principles of home and community care. Subsequently, during Iowa Legislative Session 1997, the Iowa legislature mandated that the Iowa Department of Human Services amend its current home- and community-based waivers under medical assistance to include "consumer-directed attendant care" as allowed by federal regulation.²

Consumer-directed attendance was incorporated into the following HCBS waivers: AIDS/HIV, brain injured, elderly, ill, handicapped and mental retardation. In August 1998, a sixth waiver, physical disability, was approved by the federal government with Iowa following suit.

The Iowa Medicaid Program reimburses services when consumer-directed attendant care is part of the consumer's care plan and the social worker or case manager has determined that the prior training and experience are sufficient to meet the

consumer's needs as identified in the HCSB agreement. The agreement is attached. Services are divided into nonskilled service components and skilled service components.

Question one:

The petitioner presents four questions. The first question posed is as follows:

1. Can the Iowa licensed registered nurse who supervises the consumer-directed attendant care (CDAC) provider in the provision of personal care, or other care which does not require the knowledge and skill level of the registered nurse, be held accountable by the Iowa Board of Nursing for the improper performance of the personal care services rendered by the CDAC provider, when the supervising R.N. has provided appropriate training regarding the tasks to be performed by the CDAC provider, and the CDAC provider has demonstrated the ability to appropriately perform the tasks, and there has been on-going supervision by the nurse?

According to the Petitioner, the answer to the first question presented is "No." The Petitioner believes this is a case of first impression and is unaware of any case law on the matter. The Petitioner is likewise unaware of any instances of nurses in other settings (i.e., nursing facilities, hospitals, etc.) where the licensee was disciplined for the failure of the unlicensed assistive personnel (UAP) to properly carry out their responsibilities, when the licensee properly delegated certain tasks to the UAP.

The registered nurse does have a responsibility to determine that the care provided by the CDAC provider is adequate and

conforms to recognized standards of care. 655 IAC 6.2(5)(d)(4). Consistent with this, the registered nurse utilizes his or her professional judgment, based on the nursing process to assess the needs of the patient, as well as the abilities of the care provider that will be rendering certain consumer-directed services. 655 IAC 6.2(5)"c." The nurse intervenes as necessary with instruction on proper care, and evaluates the care provided by such techniques as direct observation of the provision of care through return demonstration, as well as monitoring of the care provided, on an intermittent basis both in the presence and absence of the CDAC provider. 655 IAC 6.2(5)(d)(1)-(4).

The rule at 655 IAC 6.2(5)"d"(3) indicates that the registered nurse retains accountability for the delegation of nursing tasks, as a part of supervision. The Petitioner understands this to mean that the licensee may be disciplined for improper delegation, but if delegation was proper (as described in paragraph 11(a) above), but the UAP or CDAC provider intentionally or negligently departed from the proper provision of care as instructed by the registered nurse, the nurse is not held accountable or disciplined by the Iowa Board of Nursing for a non-nurse's actions. The Iowa Board of Nursing has defined accountability to mean, "being obligated to answer for one's acts, including the act of supervision." 655 IAC 6.1 (1st unnumbered

paragraph). Thus, the Board would only discipline the nurse for his/her own acts in this matter and not the acts of the unlicensed assistive personnel.

In other words, the Petitioner is unaware of any legal basis under the rules of the Board, for making the registered nurse a "guarantor of the patient's safety." Especially in the home care setting, where the nurse is not present or on the premises at all times, the nurse cannot control all facets of the environment, the patient's behavior, or the CDAC provider's behavior. The nurse has to take reasonable steps to determine the consumer's plan of care is being properly carried out, but is not responsible to the licensing board for another person's actions contrary to the consumer's plan of care when the nurse has undertaken the steps provided above.

Board response to question one:

In posing this question, the Petitioner appears to rely on 655 IAC 6.1, 6.2(5), 4.6 and 4.6(4)"d," 441 IAC 77.30(7)"a"(2), 77.33(15)"a"(2), 77.34(8)"a"(2), 77.37(21)"a"(2), 7.39(24)"a"(2) and 77.41(2)"a"(2). No other legal authority is cited in the Petitioner's position that supports the answer "No." In addition, the petition lacks citation of acceptable profession standards, journals or treatise in support of a negative answer. The Petitioner alleges that in some instances the CDAC provider performs services that require the knowledge and skill of the

registered nurse, but does not provide further clarity to this statement or provide examples.

The Petitioner is directed to 441 IAC Chapters 78 and 79.

78.34(7) provides the following:

78.34(7) Consumer-directed attendant care service. Consumer-directed attendant care services are service activities performed by a person to help a consumer with self-care tasks which the consumer would typically do independently if the consumer were otherwise able.

a. The service activities may include helping the consumer with any of the following nonskilled service activities:

- (1) Dressing.
- (2) Bath, shampoo, hygiene, and grooming.
- (3) Access to and from bed or a wheelchair, transferring, ambulation, and mobility in general. It is recommended that the provider receive certification of training and return demonstration for transferring. Certification for this is available through the area community colleges.
- (4) Toilet assistance, including bowel, bladder, and catheter assistance. It is recommended that the provider receive certification of training and return demonstration for catheter assistance. Certification for this is available through the area community colleges.
- (5) Meal preparation, cooking, eating and feeding but not the cost of meals themselves.
- (6) Housekeeping services, which are essential to the consumer's health care at home.
- (7) Medications ordinarily self-administered including those ordered by a physician or other qualified health care provider. It is recommended the provider successfully complete a medication aide course administered by an area community college.
- (8) Wound care.
- (9) Assistance needed to go to or return from a place of employment and assistance with job-related tasks while the consumer is on the job site. The cost of transportation for the consumer and assistance with understanding or performing the essential job functions are not included in consumer-directed attendant care services.
- (10) Cognitive assistance with tasks such as handling money and scheduling.

(11) Fostering communication through interpreting and reading services as well as assistive devices for communication.

(12) Assisting or accompanying a consumer in using transportation essential to the health and welfare of the consumer. The cost of the transportation is not included.

b. The service activities may include helping the consumer with any of the following skilled services under the supervision of a licensed nurse or licensed therapist working under the direction of a physician. The licensed nurse or therapist shall retain accountability for actions that are delegated. The licensed nurse or therapist shall ensure appropriate assessment, planning, implementation, and evaluation. The licensed nurse or therapist shall make on-site supervisory visits every two weeks with the provider present. The cost of the supervision provided by the licensed nurse or therapist shall be paid from private insurance and other third-party payment sources, Medicare, the regular Medicaid program, or the early periodic screening diagnosis and treatment program before accessing the HCBS waiver.

(1) Tube feedings of consumers unable to eat solid foods.

(2) Intravenous therapy administered by a registered nurse.

(3) Parenteral injections required more than once a week.

(4) Catheterizations, continuing care of indwelling catheters with supervision of irrigations, and changing of Foley catheters when required.

(5) Respiratory care including inhalation therapy and tracheotomy care or tracheotomy care and ventilator.

(6) Care of decubiti and other ulcerated areas, noting and reporting to the nurse or therapist.

(7) Rehabilitation services including, but not limited to, bowel and bladder training, range of motion exercises, ambulation training, restorative nursing services, reteaching the activities of daily living, respiratory care and breathing programs, reality orientation, reminiscing therapy, remotivation, and behavior modification.

(8) Colostomy care.

(9) Care of medical conditions out of control, which includes brittle diabetes and comfort care of terminal conditions.

(10) Postsurgical nursing care.

(11) Monitoring medications requiring close supervision because of fluctuating physical or psychological conditions, e.g., antihypertensives, digitalis preparations, mood-altering or psychotropic drugs, or narcotics.

(12) Preparing and monitoring response to therapeutic diets.

(13) Recording and reporting of changes in vital signs to the nurse or therapist.

c. A unit of service is 1 hour, or one 8- to 24-hour day provided by an individual or an agency. Each service shall be billed in whole units.

d. The consumer, parent, guardian, or attorney in fact under a durable power of attorney for health care shall be responsible for selecting the person or agency who will provide the components of the attendant care services to be provided.

e. The consumer, parent, guardian, or attorney in fact under a durable power of attorney for health care shall determine the components of the attendant care services to be provided with the person who is providing the services to the consumer.

f. The service activities may not include parenting or childcare for or on behalf of the consumer.

g. The consumer, parent, guardian, or attorney in fact under a durable power of attorney for health care and the provider shall complete and sign Form 470-3372, HCBS Consumer-Directed Attendant Care Agreement. A copy of the completed agreement shall be attached to the service plan, which is signed by the service worker prior to the initiation of services, and kept in the consumer's and department's records.

h. If the consumer has a guardian or attorney in fact under a durable power of attorney for healthcare, the care plan shall address how consumer-directed attendant care services will be monitored to ensure the consumer's needs are being adequately met.

i. If the consumer has a guardian or attorney in fact under a durable power of attorney for health care, the guardian or attorney in fact shall sign the claim form in place of the consumer, indicating that the service has been provided as presented on the claim.

j. The frequency or intensity of services shall be indicated in the service plan.

k. Consumer-directed attendant care services may not be simultaneously reimbursed with any other HCBS waiver services.

l. Consumer-directed attendant care services may be provided to a recipient of in-home health-related care services, but not at the same time.

Board of Nursing rules related to accountability and supervision are found in 655 IAC 6.2(5), and state:

6.2(5) The registered nurse shall recognize and understand the legal implications of accountability. Accountability includes but need not be limited to the following:

a. Performing or supervising those activities and functions which require the knowledge and skill level currently ascribed to the registered nurse and seeking assistance when activities and functions are beyond the licensee's scope of preparation.

b. Assigning and supervising persons performing those activities and functions which do not require the knowledge and skill level currently ascribed to the registered nurse.

c. Using professional judgment in assigning and delegating activities and functions to unlicensed assistive personnel. Activities and functions which are beyond the scope of practice of the licensed practical nurse may not be delegated to unlicensed assistive personnel.

d. Supervising, among other things, includes any or all of the following:

(1) Direct observation of a function or activity.

(2) Assumption of overall responsibility for assessing, planning, implementing, and evaluating nursing care.

(3) Delegation of nursing tasks while retaining accountability.

(4) Determination that nursing care being provided is adequate and delivered appropriately.

The Petitioner inquires about the registered nurse who "supervises the consumer-directed attendant care provider in the provision of *personal* care."

Department of Human Services rules do not reference *personal* care, but set apart *nonskilled* service activities and *skilled* service activities. Since the term *personal* care is not found in this section of the rules, the board assumes the Petitioner's question concerns *nonskilled* services.

The board also assumes that the Petitioner's use of the terminology "be held accountable" means can the registered nurse be disciplined by the board for improper performance of personal care services rendered by the CDAC provider who has demonstrated competency.

The board's authority to discipline a licensee is found in Iowa Code chapters 17A, 147, 152 and 272C. The process for handling complaints is set out in 655 IAC Chapter 4.

The Board's rules require the board to investigate or review written complaints received by the board, which the board reasonably believes constitutes cause for licensure discipline. See 655 IAC 4.2(1) Grounds for discipline, as well as the disciplinary process are spelled out in subsequent sections of 655 IAC Chapter 4 as required by Iowa Code chapter 17A.

The board declines to answer question **one** because the facts presented are not subject to the board's jurisdiction. The aforementioned Iowa Department of Human Services rules do not require or expect the registered nurse to supervise the CDAC provider in the provision of *nonskilled* services.

The board also declines to answer question **one** on the basis that the Board cannot speculate how it would handle an individual complaint. To do so, would be in violation of Iowa Code chapter 17A, as well as its own administrative rules.

Moreover, disciplinary action involving a licensee is dependent upon the facts and circumstances presented by the investigation.

Question two:

Must the Iowa licensed nurse decline to supervise the CDAC provider, who (sic) insists on maintaining as their (sic) CDAC provider, if in the professional judgment of the registered nurse, the unlicensed assistive personnel is unable or unwilling to provide services to the consumer, which are adequate or delivered appropriately?

According to the Petitioner, the answer to the second question is "yes." Under Iowa law, the registered nurse who provides supervision of the CDAC provider has a duty to determine that the care provided by the CDAC provider is adequately and appropriately delivered. 655 IAC 6.2(5)"d"(4). Thus, if in the nurse's professional opinion the CDAC provider is unwilling or unable to provide care in conformance with appropriate standards of care, the nurse must decline to participate in supervision of care by the CDAC provider to the patient. Since the CDAC provider is hired by the consumer, the nurse may, in effect, no longer be able to serve the consumer, who insists on maintaining a CDAC provider contrary to the registered nurse's professional opinion.

Board response to question two:

The Petitioner does not make it clear whether the question is about registered nurse supervision of *nonskilled* service components or *skilled* service components. If the Petitioner is

inquiring about nonskilled components, then the facts presented are not subject to the board's jurisdiction. Registered nurse supervision in regard to provision of the nonskilled components is not expected or required.

If the Petitioner is inquiring about nursing supervision of skilled services, the question begs a different answer. In a specific circumstance, declining to supervise the provider may not be the only choice available. It is not possible, however, for the board to provide an answer to this hypothetical question. Therefore, the board declines to provide an answer to this hypothetical question and directs the Petitioner instead to its administrative rules. Applicable rules include, but are not limited to 655 IAC 6.2(5)"b," "c" and "d," which are printed in their entirety on page eleven of this document.

The board advises the Petitioner that according to its rules found at 655 IAC 4.6(4) unethical conduct includes, but is not limited to, improper delegation of nursing services, functions, or responsibilities, committing an act or omission which may adversely affect the physical or psychosocial welfare of the patient or client, committing an act which causes physical, emotional or financial injury to the patient or client, and failing to assess, accurately document, or report the status of a patient or client.

Question three:

Must the Iowa licensed nurse decline to supervise the CDAC provider, who [sic] a consumer insists on maintaining as their CDAC provider to provide services which require the knowledge or skill level of the registered nurse, if in the professional judgment of the registered nurse, the unlicensed assistive personnel is performing services which require the knowledge or skill level of the registered nurse?

According to the Petitioner, the answer to the third question is "yes." Under Iowa law, the registered nurse who provides supervision of the CDAC provider has a duty to determine that the care provided by the CDAC provider is adequately and appropriately delivered. 655 IAC 6.2(5)"d"(4). Additionally, if in the nurse's professional opinion the CDAC provider is rendering services which require the knowledge or skill level of the registered nurse, the registered nurse who supervises such care may be viewed as having effectively concurred with the delegation of such services, in violation of the regulatory requirement at 655 IAC 6.2(5)"c."

This is analogous to the registered nurse who instructs the unlicensed assistive personnel in the proper performance of perineal care and wiping from front to back; if the nurse subsequently observes or otherwise learns of perineal care being performed with wiping from back to front, the nurse has an obligation to intervene and correct this. His or her failure to do so would be, in effect, a concurrence in the improper care, which would fall below the standard of care for the nurse, thus

subjecting him or her to disciplinary action by the board. Thus, the nurse must decline to participate in the supervision of care by the CDAC provider to the patient, or the nurse may be disciplined by the Iowa Board of Nursing for improper delegation. 655 IAC 4.6(4)"d." Since the CDAC provider is hired by the consumer, the nurse may, in effect, no longer be able to serve the consumer, who insists on maintaining a CDAC provider contrary to the registered nurse's professional opinion.

Board response to question three:

The board declines to answer question three because of its hypothetical and vague nature. As indicated above, in an individual case, declining to supervise the provider may not be the only choice available.

Question four:

If the answers to the foregoing questions are yes, can the Iowa Board of Nursing provide guidance to the Iowa licensed registered nurse in terminating his/her relationship with the consumer so as to minimize the risk of discipline by the Board of Nursing for patient abandonment (See IAC 4.6(4)(h)), while likewise minimizing risk of discipline by the Board of Nursing for improper delegation.

The Petitioner proposes the following response to question **four:**

Petitioner believes that the Iowa Board is uniquely positioned to answer this question. At a minimum, Petitioner believes that a competent consumer has the right to determine who will provide their consumer-directed attendant care.

Likewise, Petitioner believes that the competent consumer may terminate a particular registered nurse from providing supervision on his or her case without the registered nurse being exposed to disciplinary action by the Iowa Board of Nursing on the issue of abandonment. A registered nurse who terminates services from a consumer receiving CDAC should provide adequate notice to the consumer and continue to work with the unlicensed assistive personnel in an attempt to improve the care until the registered nurse's termination from the case.

Board response to question four:

The board declines to provide a "yes" or "no" answer to the question. The decision to terminate the nurse-client relationship rests with the individual nurse based on the individual circumstances of the relationship. The board directs the Petitioner to 655 IAC 4.6(4)"h," which provides that unethical conduct includes failing to report to or leaving a nursing assignment without notifying appropriate supervisory personnel and ensuring the safety and welfare of the patient or client. The board asks the Petitioner to consider, in particular, the portion of the rule, which requires the nurse to protect the safety and welfare of the client. The board also directs the Petitioner to consider agency policy in regard to termination of the nurse-client relationship as well as other requirements set out in state and federal law.

¹ Alecxih, L., Lutsky, S., Corea, J. 1996, November, Estimated Cost Savings from the Use of Home & Community-based Alternatives to Nursing Facility Care in Three States, AARP Public Policy Institute.

² Impact of Incorporating Personal Care Services Into Medicine Assistance, Iowa Department of Human Services Response to House File 715, January 1998.

M. Ann Aulwes-Allison, R.N., M.A., Ed.S. March 7, 2003
Chairperson Date
Iowa Board of Nursing

Lorinda K. Inman, R.N., M.S.N. March 7, 2003
Executive Director Date
Iowa Board of Nursing